disposal order of the opium. If no disposal order is made considerable inconvenience may result. Also if the appellants succeeded in these appeals against conviction difficulty would arise. It may be useful if I refer to *Yong Chiau & Three others* v. *Public Prosecutor* [1] where in the course of his judgment at page 4 Williams C.J. said:

"At the conclusion of the case when the magistrate had found the appellants guilty and pronounced sentence it was the duty of the prosecuting officer to make application to him under section 357(2) of the Criminal Procedure Code for the disposal of the property seized. No such application was, however, made. At the hearing of the appeal the deputy legal adviser, in answer to a question by me, stated that the confiscated property was now in court and that he would ask for my order. As I have said such an order should have been asked for and obtained in the court below in open court immediately after the conclusion of the trial. If there had been no appeal, I am quite sure that the police would later have obtained an order from the magistrate but the appellants and the other convicted persons might not have been present to hear the order. They might, therefore, be left with the impression that the articles seized or some of them were kept by the police for themselves. Justice, as is often said, must not only be done but it must be manifest to those most concerned that it is being done. Applications should always be made in open court to the magistrate for a disposal order, where property has been seized, immediately after he has given judgment."

The learned magistrate before passing sentence had realised that the appellants were probably small links in a long chain of drug traffickers and that their rewards might be small compared with the profits of the organisers. One can always be sympathetic to the unfortunate addicts, some of whom are known to have been smoking opium in pre-war days when smoking opium was legal. Traffickers on the other hand cannot expect sympathy. Importation and possession of opium are serious offences. Opium is a dangerous drug which brings untold misery to an addict.

When a person is found to have possession of opium in such quantity as to show positively and convincingly that he is engaged in trafficking in such drug the proper sentence is a deterrent sentence. A fine can never be a deterrent sentence in a case of this nature. It is true that appellants might be carriers and were necessary tools to the organisation. Nevertheless they were just as guilty as the traffickers. They acted as carriers with their eyes wide open and realised the risk they took.

There is no reason for me to disturb the sentences imposed by the learned magistrate. If I may say so the sentences were not excessive in any way. Accordingly I dismissed the appeals.

Appeals dismissed.

KWAN SUN MING v. CHAK CHEE HING

[F.C. (Wylie C.J. (Borneo), Suffian and Gill JJ.) December 1, 1964]

[Jesselton — Federal Court Civil Appeal No. 90 of 1964]

Contract — Timber — Towage — Breach — Defence of "act of God" because of storm — Finding of trial judge — Measure of damages — Evidence of usage.

This was an action for damages for breach of contract or alternatively damages for negligence arising out of a contract to tow 303 logs from Kampong Abai to Sandakan. The defence was that the 253 logs were lost in a storm so violent as to amount to an "act of God" and the defendant should be excused from all liability for damages. The learned judge held that although there was a storm it was not a storm violent enough to be regarded as an "act of God" and gave judgment against the defendant and awarded the plaintiff damages based on the cost at which the logs were purchased.

Held: (1) there was no justification for interfering with the finding of the learned trial judge on the question whether the storm amounted to an "act of God" because his finding was based on all the evidence given in this case;

(2) there was no evidence to establish usage and the damages must be assessed on the proper value of the logs, that is the value of the logs at the place of delivery.

FEDERAL COURT.

W. K. Loo for the appellant.

A. F. H. Crawshaw for the respondent.

Wylie C.J. (Borneo) (delivering oral judgment): This is an appeal against the decision of the Honourable Mr. Justice Simpson given at Sandakan on 17th September, 1964. The original claim was for damages for breach of contract or alternatively damages for negligence. Judgment was given against the first defendant solely on the claim for breach of contract and the claim against the second defendant, which was based on negligence, was dismissed.

The claim arises from a contract to tow 303 logs from Kampong Abai on the Kinabatangan river to Sandakan. The respondent had purchased the logs at a nearby kampong and had contracted with the appellant to tow these logs by sea to Sandakan. When the launch and logs arrived at Sandakan there were only 50 logs. The other 253 logs were never found despite a two-day search. The claim is for the value of these 253 logs for breach of this contract to deliver the logs to Sandakan. Judgment was based on non-delivery. From that judgment the appellant has appealed on several grounds.

The only defence to the whole claim put forward in the court below was that these logs were lost in a storm so violent as to amount to "an act of God", and thus the appellant asked to be excused from all liability for damages. It must be conceded that that would have been an adequate defence to this claim. I refer to *Halsbury*, 3rd edition, Vol. 8, p. 183 for a concise

definition of what constitutes "an act of God":

"An act of God, in the legal sense of the term, may be defined as an extraordinary occurrence or circumstance which could not have been foreseen and which could not have been guarded against; or, more accurately, as an accident due to natural causes, directly and exclusively without human intervention, and which could not have been avoided by any amount of foresight and pains and care reasonably to be expected of the person sought to be made liable for it, or who seeks to excuse himself on the ground of it....."

A feature of both those definitions is that the event must be one which could not have been foreseen and which could not have been guarded against. It is obvious that in a towage contract of this nature a storm must be expected and would have to be guarded against, especially in the open sea. The appellant would therefore be bound as part of his contract to take all precautions necessary against storms that might reasonably be foreseen. For a storm at sea to be regarded as an act of God it would have to be a storm that could not have been reasonably foreseen in the circumstances. The evidence as to the storm is really confined to the evidence of the people on the launch. Despite that evidence, as was pointed out by counsel for the respondent, the launch came through safely with 50 logs. There was no evidence that the launch was shipping water. In fact there was evidence to the contrary. There was no evidence about having to pump out water or about any other consequences to be expected if the storm was as violent as was alleged. There is the further aspect of engine speed. Obviously the judge was not impressed by the evidence concerning change of speed and there was apparently no need to reduce speed to any extent.

For these reasons I cannot see any justification for interfering with the finding of the trial judge based on all the evidence given in this case. His finding was that while there was a storm, it was not a storm violent enough to be regarded as an act of God. The defence therefore failed. The contract involved delivery of 303 logs to Sandakan, 253 logs were not delivered and therefore the appeal against liability for this loss must also fail.

As to the question of amount of damages, the first point raised involves the question of usage. The other point raised is what measure should be applied in the absence of any usage. As to usage, the evidence was not strong. It was certainly not consistent. One firm paid $10 under special circumstances. Other people did not know of any usage at all, and some of the evidence was actually contradictory. Again, some of the evidence tendered was in fact evidence of an agreed rate of $25 and that obviously did not establish usage. On this question I refer to *Halsbury*, Vol. 11, page 199, to the following effect:—

"....Every usage, of which the courts do not take judicial notice, must be clearly shown to exist. The evidence must also be clear and convincing and it must be consistent."

The consequences that would flow from the decision of the court that a specific usage had been established in an industry so extensive as the timber industry in Sandakan, illustrate the importance of the evidence being clear and convincing before the court can establish that such a usage does exist. In the present case it is not clear and is contradictory in parts. Consequently I consider that usage was not established in the present instance.

That brings me to the question of the measure to be used in assessing damages. The proper value is the value of the logs at Sandakan. The contract was for delivery of the logs at Sandakan, so obviously the value must be the value of the logs at Sandakan.

So far as the value of these logs in Sandakan is concerned, the only evidence before the court is that of the price realised for the 50 logs which were not lost. There was no other evidence, and I see nothing wrong in taking the value of these 50 logs, in the absence of any other valuation, as the basis on which to calculate the value of the 253 logs which were lost.

The calculations which have been done for us show that the cost of the logs was $58.59 per log but that they realised only $49.44 per log at Sandakan. In my judgment the second figure should have been taken. The judgment of the court below was based on the first figure and I consider therefore that the amount of damages must be reduced by the difference between these two values. That difference is $9.15 per log and for 253 logs this makes a total reduction of $2,314.95. Reducing the sum awarded by this amount leaves a figure of $10,838.85. The judgment of the court below should be varied by substituting this figure for the total sum awarded by that court.

Suffian J.: I agree.

Gill J.: I also agree.

Wylie C.J.: That being the judgment of this court, the appeal is dismissed subject to the variation in the amount of the damages already referred to.

Cross appeal is dismissed.

(*After argument*): Cost of appeal to respondent; cost of cross-appeal to appellant.

Deposit to be paid out to respondent against his taxed costs.

Appeal and cross appeal dismissed.
Judgment of the court below varied.